

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

E. I. DU PONT DE NEMOURS AND COMPANY

and

AMPTHILL RAYON WORKERS, INC., LOCAL 992,
INTERNATIONAL BROTHERHOOD OF DUPONT
WORKERS

Case 5-CA-90984

FREON CRAFTSMAN UNION, LOCAL 788,
INTERNATIONAL BROTHERHOOD OF DUPONT
WORKERS

Case 9-CA-91793

INTERNATIONAL BROTHERHOOD OF DUPONT
WORKERS (IBDW), LOCAL 593, OLD HICKORY
EMPLOYEES COUNCIL

Case 26-CA-92629

**COUNSEL FOR THE GENERAL COUNSELS' BRIEF IN SUPPORT OF
LIMITED CROSS-EXCEPTIONS OF COUNSEL FOR THE GENERAL COUNSEL**

Counsel for the General Counsel expects to file an Answering Brief, which will contain further detailed discussion of the merits of this case. Accordingly, this brief will not discuss the entire, massive unilateral change that the Respondent, DuPont, made when it eliminated retiree secondary health and medical coverage and farmed it out to a third party. Rather, this brief concerns the General Counsel's exception that predecessor unions to the Freon Craftsman Union, Local 788, International Brotherhood of DuPont Workers, filed unfair labor practice charges several times over the years, and these charges concerned changes to MEDCAP and the Dental Plan.¹

DuPont announced on the last day of the trial that, though the unions in Louisville had indeed filed unfair labor practice charges over unilateral changes to Beneflex (health benefits for current employees), these charges did not concern MEDCAP and the Dental Plan (health

¹ "J" refers to a Joint Exhibit, "GC" refers to a General Counsel Exhibit, and "Tr." refers to the transcript. "Tr." citations will also include the name of the testifying witness.

benefits for retirees, and the subject of this case).² DuPont should be estopped from even making this argument.

First, the parties in this case, before the General Counsel presented evidence about these charges, agreed that “[t]he medical and dental benefits offered through BeneFlex mirror those under MEDCAP and the Dental Plan. Changes made to the BeneFlex medical and Dental plans have been carried over and implemented with respect to the minor versions of MEDCAP and the Dental Plan.” J-4, Stip. 23. The company has always asserted that evidence of changes to active employee benefits supports its waiver argument. See, e.g., *Palmore Tr.* 136.³ Indeed, the Company filled the record two years ago with multiple binders

² “That with respect to the waiver issue, it’s clear that DuPont presented to the Union changes to both BeneFlex and MEDCAP and dental over the years; that the Union failed to file unfair labor practice charges with respect to the changes to MEDCAP and dental as reflected in the unfair labor practice charges that were submitted into evidence yesterday. And I think the stipulations are just more background to reflect that fact, that the unfair labor practice charges relate to BeneFlex, not to MEDCAP, not to dental. Simple as that.” *Tr.* 454 (this assertion is mistakenly attributed to Charging Party Counsel Henley, rather than Mr. Meade).

³ MR. MEADE: I’m only asking about the fact that actives and retirees have long had options that they needed to select from, and I’m going to tie it up by saying, by getting testimony regarding how they get information on that.

Q. BY MR. MEADE: So both actives and retirees can from time to time change their investment options under the 401(k) plan, right?

A. Yes.

Palmore Tr. 136.

Q. That’s what I’m asking. How many options does Cigna offer to active employees at the Spruance Plant?

A. I believe it’s two.

Id. at 137.

Again, here is a portion of the Company’s opening statement, which lacks any persuasive aspect if changes made to BeneFlex did not equate to changes made to MEDCAP (which was 90% of the Company’s evidence in both trials):

For decades DuPont made changes to these two benefit plans. It made amendments to eligibility criteria, changes to premium costs that would be paid by retirees, and changes to other elements of the plans. DuPont regularly informed the Union of these changes and typically did so well in advance of implementing them, not to offer to bargain over the changes, but to inform the Union of them. And prior to 2006, never, never did the Union claim that DuPont was required to bargain with the Union over the changes, never did the Union demand to bargain over the changes, never did the Union file an unfair labor practice charge challenging the unilateral changes, and never did the Union file a grievance over any of the changes. Why is that? It’s because the Union knew and frankly still knows that DuPont agreed to have union-represented employees participate in the plans only if the Union agreed to the reservation of rights language in those plans, language that permitted and still permits DuPont to amend the plans in any way, any time, for any reason, without first bargaining to agreement or impasse, language that even permits DuPont to terminate or discontinue the plans at issue unilaterally without bargaining with the Union. J-2 at 13-14.

demonstrating changes to Beneflex, which the Company claimed the Union insufficiently challenged, and that therefore the Union had waived any right to bargain over MEDCAP. The judge specifically found in 05CA-033461, currently pending at the Board, that “Anderson testified that, with the exception of the eligibility criteria, there is virtually no distinction between the benefits structures of BeneFlex, MEDCAP, and DAP. (Tr. 147–149.) As further discussion of the record demonstrates, however, there were numerous changes to retiree health and dental plan benefits, including caps, premiums and coverages.” See *E.I. DuPont de Nemours*, 05-CA-033461, JD 49-11, fn. 15 (August 22, 2011).

Numerous examples in the record demonstrate the inseparable nature of Beneflex and MEDCAP, as originally argued by DuPont. For example, J-25, Tab37 are the minutes of a meeting held October 15, 2002. The stated point of the meeting was “[m]anagement shared with both unions the 2003 Beneflex changes.” *Id.* at DUPMD001239. However, the parties also discussed retiree healthcare costs. *Id.* at DUPMD001240. J-25, Tab 39 is also labeled “Beneflex 2007 Plan” update. However, there is detailed discussion of retirees on the second page of the notes. *Id.* at DUPMD001296. Furthermore, the Beneflex 2007 handout that went with the notes contains information for retirees. *Id.* at DUPMD001323.

Lastly, the Company attempted to elicit testimony to show that previous charges filed against DuPont were not about MEDCAP, but rather only Beneflex. Gregory Lowman, president of Local 788, obviously confused by this new tack, testified both for and against this proposition. Brenda Kelsey, a DuPont witness, undermined the Employer’s argument with her testimony. On direct, Kelsey testified that GC-51G, the unfair labor practice charge that the Louisville union filed in 2007 concerning the massive changes announced in 2006, concerned Beneflex and MEDCAP.

Q. And does that charge relate to MEDCAP and the Dental Plan?

A. I believe it does.

Q. Does it also relate to benefits offered under BeneFlex?

A. Yes.

Kelsey Tr. 508. However, when confronted on cross with the actual 2007 charge in front of her, Kelsey candidly admitted that there was nothing on GC-51G that indicated it applied to retirees:

Q. BY MR. BEATTY: I think my question was, if I remember, is that you testified that these charges concerned changes to retirement medical and dental, correct? I mean they may have included active employees as well, but they also included changes to retiree health and dental. I thought that Was your testimony?

A. I may have said that. I don't see it on here.

Kelsey Tr. 513. Thus, Kelsey exposed the fundamental weakness of this argument. Kelsey could not “see” how the charge affected MEDCAP, because there was nothing *to* see. The Company knows it must concede that GC-51G, the 2007 charge, concerns MEDCAP because it litigated the same charge language in 05-CA-033461 two years ago. However, the 2007 charge simply refers to “medical plan.” GC-51G. Substantively, this is no different from the language used in charges filed in prior years, such as “the health benefit plan,” GC-51F, GC-51E, GC-51D, GC-51C, GC-51B, and “health care costs.” GC-51A. The Company knows it only has one Medical Plan, under which active employees receive benefits through Beneflex options and retirees receive benefits through MEDCAP. J-10, Tab F at 1; see also J-10 and Summary of Material Modifications, showing DuPont modified Beneflex and MEDCAP concurrently to reflect the changes each year. The Unions did not care what plan document was being amended – they cared about the change to benefits. As noted above, DuPont stipulated that changes made to Beneflex were also made to MEDCAP. J-4, Stip 23. Therefore, these charges indisputably show that the various unions in Louisville over the years indeed challenged the various changes made to health benefits, including MEDCAP,

over the years. Accordingly, Your Honor should reject DuPont's post hoc attempt to discount this telling evidence.⁴

Respectfully submitted,

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⁴ The Brief in Support of Limited Cross-Exceptions of Counsel for the Acting General Counsel filed on October 31, 2011, currently pending in 05-CA-033461, is incorporated by reference into this Brief.

CERTIFICATE OF SERVICE

I hereby certify that the Limited Cross-Exceptions of Counsel for the General Counsel and Brief in Support of Limited Cross-Exceptions of Counsel for the General Counsel were electronically filed on February 10, 2014, and, on that same day, copies were electronically served on the following individuals by email:

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